



Federal Communications Commission
Washington, D.C. 20554

August 26, 2003

DA 03-2721

Mark J. Tauber, Esquire
Paul W. Jamieson, Esquire
Piper Rudnick
1200 19th Street, NW
Washington, D.C. 20036-2412

Re: Request for Confidentiality Pursuant to 47 C.F.R. § 0.459

Dear Messrs. Tauber and Jamieson:

Star Wireless LLC (“Star”) has requested¹ that the Commission grant confidential treatment, pursuant to Section 0.459 of the Commission’s rules,² to the contents and existence of certain documents that it has provided in its response to a Commission letter of inquiry.³ Specifically, Star requests that the information that it provided in a letter to the Commission dated July 16, 2003, as supplemented on July 22, 2003, be treated as confidential.⁴ For the reasons discussed below, we deny Star’s Request.⁵

Section 0.459, the confidentiality rule, creates a procedure by which parties may request that information or materials that they have submitted to the Commission not be made routinely available for public inspection. The confidentiality rule requires that a party seeking confidentiality provide a

¹ Letter from Mark J. Tauber and Paul W. Jamieson, counsel for Star, to Judy Lancaster, Esquire, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 16, 2003 (the “July 16 Letter”); Letter from Mark J. Tauber, Esquire, to Judy Lancaster, Esquire, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 22, 2003 (the “July 22 Letter”) (collectively, the “Request”).

² 47 C.F.R. § 0.459.

³ Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission to David. G. Behenna, dated July 2, 2003 (the “LOI”).

⁴ See Letter from David G. Behenna to Judy Lancaster, Esquire, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated July 16, 2003. By the July 22 Letter, counsel for Star provided an attachment referred to in, but omitted from, Mr. Behenna’s letter, and incorporated by reference its confidentiality request detailed in the July 16 Letter. (Mr. Behenna’s letter and the July 22 Letter are referred to herein as the “Response.”) Counsel for Star agreed to narrow the scope of its confidentiality Request in a telephone conversation with Commission staff on August 26, 2003. This order addresses the Request as so narrowed.

⁵ By Letter to E. Ashton Johnson, Esquire and Paul W. Jamison, Esquire, from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (DA 03-2681, rel. Aug. 15, 2002), the Wireless Telecommunications Bureau denied a similar request by Star with regard to other materials that it submitted to the Commission regarding this matter.

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statement of the reasons for withholding the materials in question from public inspection and set forth the specific categories of materials for which such treatment is appropriate.⁶ Star has failed to make this required showing. For instance, Star does not claim that the information that it submitted to the Commission is “commercial or financial, contains a trade secret or is privileged.”⁷ Instead, it speculates that disclosure of the information contained in its Response “would almost certainly result in competitive harm to Star Wireless and/or its affiliates and abuse of the Commission’s pleading process.”⁸ Specifically, Star maintains that the public disclosure of its Response may result in abuse of the Commission’s processes by a third party that has filed pleadings in opposition to an application of a Star affiliate.⁹ Star argues that this petitioner and other parties that are “competitors” may somehow “seize upon” the information that Star has provided, to its detriment and that of its affiliates.¹⁰

Star’s Request appears to be premised on the assumption that the Commission’s procedures are insufficient to deter abuse of our processes and that the Commission may fail to impose appropriate sanctions for such abuse. We strongly disagree. The Commission has repeatedly indicated that it is prepared to impose sanctions for abuse of administrative process.¹¹ To the extent that Star is concerned that third parties, acting in good faith, may file pleadings against it and/or its affiliates based upon the

⁶ 47 C.F.R. § 0.459(b). Section 0.457 sets forth the categories of records that are not routinely available for public inspection, *i.e.*, accorded confidential treatment, and Section 0.459 sets forth the procedures for submitting requests that material or information be withheld from public inspection. For instance, Section 0.459(b)(3) provides that a request for confidentiality shall, among other things, include an “explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.” 47 C.F.R. § 0.459(b)(3).

⁷ 47 C.F.R. § 0.459(b)(3).

⁸ Request at 2.

⁹ The term “abuse of process” has been defined as “the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule.” *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process*, First Report and Order, 4 FCC Rcd 4780, 4793 n.3 (1989); *see Silver Star Communications-Albany, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 6342, 6352 ¶ 41 (1988); *Amendment of Sections 1.420 and 73.3584 of the Commission’s Rules Concerning Abuses of the Commission’s Process*, Notice of Proposed Rulemaking, 2 FCC Rcd 5563, 5563 ¶ 2 (1987); *see also Policy Regarding Character Qualifications In Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed mem. sub nom National Assoc. for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987) (strike pleadings, harassment of opposing parties, and violation of ex parte rules constitute abuse of process).

¹⁰ *Id.*

¹¹ *See Commission Taking Tough Measures against Frivolous Pleadings*, Public Notice, 11 FCC Rcd 3030 (1996) (“the Federal Communications Commission reminds parties to our proceedings and their attorneys that our rules prohibit the filing of frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the Commission or its staff.”).

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information contained in its Response, our confidentiality rules may not be used as a shield against claims that may arise through the discovery of non-confidential information.

Star also maintains that the Commission auction bidding information that it submitted in its Response is “competitively sensitive” in that it could alert others to its or its affiliates’ bidding strategy in future auctions. The bidding chart that Star has submitted consists of a chronological listing of its bids in a long-since completed auction, data that is, in fact, publicly available. For that reason alone, Star cannot claim confidentiality for such material.¹² The only information that Star provided that is not so available is its stated reason for having placed each bid in the auction, which is identical for each bid. The rationale that Star has provided for its having placed each bid is so generic as to be meaningless, providing no relevant insight into its bidding strategy other than that Star bid for the licenses in which it was interested. Star has not demonstrated, nor can we discern, how making such information public could cause Star any competitive harm.

Star also maintains that the Commission should keep the information contained in its Response confidential in order to provide an incentive to it and others “to provide complete responses to Commission inquiries without fear that the information provided will be used in an anti-competitive manner by other parties.”¹³ All Commission licensees and applicants are required to respond truthfully and candidly to Commission inquiries.¹⁴ “The requirement for absolute truth and candor from those appearing before the Commission is fundamental because the Commission must rely on the completeness of the submissions made to it by applicants.”¹⁵ As an applicant before the Commission, Star had (and has) an affirmative obligation to respond fully to the LOI, regardless of the possible disposition of that information by the Commission. Its suggestion that the Commission agree to withhold its Response from the public to somehow induce it to comply with this requirement of the rules is wholly inappropriate and we reject it.¹⁶

Accordingly, for the reasons discussed above, we DENY Star’s Request for confidential treatment. This action is taken under delegated authority pursuant to Section 0.311 of the Commission’s rules.¹⁷

¹² See *In re Mercury PCS II, LLC*, 2000, 15 FCC Rcd 14559, 14563 (2000).

¹³ Response at 4.

¹⁴ See 47 C.F.R. § 1.17.

¹⁵ *Liberty Cable Co., Inc.*, 15 FCC Rcd 25050, 25071 (2000), *recon. denied*, 16 FCC Rcd 16105 (2001), *citing Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980). See also *Contemporary Media, Inc., et al. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000).

¹⁶ See *In the Matter of Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(D) Biennial Audit Procedures*, 17 FCC Rcd 17012, 17016-17 (2002).

¹⁷ 47 C.F.R. § 0.311.

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Pursuant to section 0.459(g) of the Commission's rules,¹⁸ Star may, within five (5) working days, file an application for review by the Commission. If the application for review is denied, Star will be afforded five (5) working days within which to seek a judicial stay of the ruling. If these periods expire without action by Star, its Response will be placed in a public file. Star's Response, however, will be accorded confidential treatment, as provided for in sections 0.459(g) and 0.461,¹⁹ until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

Sincerely,

Maureen F. Del Duca, Chief
Investigations and Hearings Division
Enforcement Bureau

¹⁸ 47 C.F.R. § 0.459(g).

¹⁹ 47 C.F.R. §§ 0.459(g), 0.461.